NOTES OF CASES.

COLLEGE dormitories and dining halls for students are held in *Yale University* v. *New Haven* (Conn.), 43 L. R. A. 490, to be exclusively occupied as a college within the meaning of the statute providing for the exemption of buildings occupied as colleges from taxation.

A CONDITION in a will that a son shall procure a divorce from his wife in order to have an absolute estate, and if he does not shall have only a life estate, is held in *Randall* v. *Boston* (Ill.), 43 L. R. A. 526, to be lawful and not against public policy where the son had a divorce suit pending at the time the will was made.

THE indorsement by a person of his own name upon commercial paper belonging to another person of the same name, with knowledge of his want of title and with intent to perpetrate a fraud, is held in *Beattie* v. *National Bank of Illinois* (Ill.), 43 L. R. A. 654, to constitute a forgery which will not transfer title to the paper.

AN ordinance prohibiting any prostitute from being on the streets or alleys of the city between the hours of 7 P. M. and 4 A. M., without any reasonable necessity therefor, is held in *Dunn* v. *Com.* (Ky.) 43 L. R. A. 701, to be a valid exercise of the police power under a statute giving authority to "restrain and punish prostitutes."

THE forfeiture of land under the West Virginia constitution for the failure of the owner to enter it for taxation, is held in *State* v. *Sponaugle* (W. Va.), 43 L. R. A. 727, to be consistent with the Federal Constitution and not a deprivation of property without due process of law. See *Matney* v. *Ratliff* (Va.), 31 S. E. 512; 4 Va. Law Reg. 615.

THE duty of a railroad company to make an alteration in the grade of the crossing at its own expense so as to conform to a new grade of the street, is enforced in *Cleveland* v. *Augusta* (Ga.), 43 L. R. A. 638, as it builds its track on the implied condition that it will yield to the reasonable burdens imposed by the growth and development of the community.

AN electric street-car track laid within about seven feet of a building, is held in *Ashland etc. St. R. Co.* v. *Faulkner* (Ky.), 43 L. R. A. 554, to give the abutting owner no right to compensation, although it prevents teams from standing in front of his place of business as they had formerly been able to do. The authorities on the question of injury to abutting owners by laying street railway tracks near the side of the street are collected in a note to this case.

THE recent decision of the Supreme Court of the United States in the case of *City of Richmond* v. *Southern Bell Telephone etc. Co.*, is one of importance, and of especial interest to Virginia lawyers, since the decision of the lower court attracted the very general attention of the press of the State.

The litigation arose out of an ordinance of the city of Richmond requiring the telephone company to remove its poles and wires from the streets of the city. The company secured an injunction from the Circuit Court of the United States, on the ground that the act of Congress of 1866, authorizing "telegraph" companies, under certain conditions, to maintain and operate lines over and along any of the military or post roads of the United States, applied to "telephone" companies as well—the streets of all cities and towns over which letter-carrier routes are established, having been declared by Congress to be post roads. The chief point of controversy was as to whether telephone companies were within the perview of this act. The Circuit Court held that they were, and this ruling was affirmed by the Circuit Court of Appeals.

This decision is now reversed by the Supreme Court, which holds that while the public policy intended to be promoted by the act of 1866 would suggest the extension of similar privileges to telephone companies, yet as the method of transmitting articulate speech electrically was not invented until ten years after the act was passed, companies operating such lines could not then have been in contemplation of Congress.

Mr. Justice Harlan delivered the opinion of the court. Upon the question as to whether telephone companies could claim the benefits of the act of 1866, the court said:

"But independently of any question as to the extent of the authority granted to 'telegraph' companies by the act of 1866, we are of opinion that the courts below erred in holding that the plaintiff, in respect of the particular business it was conducting, could invoke the protection of that act. The plaintiff's charter, it is true, describes it as a telephone and telegraph company. Still, as disclosed by the bill and the evidence in the cause, the business in which it was engaged and for the protection of which against hostile local action it invoked the aid of the Federal court, was the business transacted by using what is commonly called a 'telephone,' which is described in an agreement between the Western Union Telegraph Company and the National Bell Telephone Company, in 1879, as 'an instrument for electrically transmitting or receiving *articulate speech*.'

"Our attention is called to several adjudged cases, in some of which it was said that communication by telephone was communication by telegraph. *Attorney General* v. *Edison Telephone Co.*, 6 Q. B. Div. 244, 255; *Chesapeake & Potomac Telephone Co.* v. *B. & O. Telegraph Co.*, 66 Md. 399; *Wisconsin Telephone Co.* v. *City of Oshkosh*, 62 Wis. 32; *Duke* v. *Central New Jersey Telephone Co.*, 53 N. J. L. 341; *Cumberland Telephone and Telegraph Co.* v. *United Electric Railway Co.*, 42 Fed Rep. 273. Upon the authority of those cases it is contended that the act of Congress should be construed as embracing both telephone and telegraph companies.

"The English case was an information filed for the purpose of testing the question whether the use of certain apparatus was an infringement of the exclusive privilege given to the Postmaster-General by certain acts of Parliament as to the transmission of 'telegrams.' The court held that the Postmaster-General was entitled, looking at the manifest objects of those acts, and under a reasonable

interpretation of their words, to the exclusive privilege of transmitting messages or other communications by any wire and apparatus connected therewith used for telegraphic communication, or by any other apparatus for communicating information by the action of electricity upon wires. The Maryland case involved the question whether a company organized under a general incorporation law of Maryland was authorized to do a general telephone business. In the Wisconsin case some observations were made touching the question whether telephone companies, although not specifically mentioned in a certain general law of that State, could be incorporated with the powers given to telegraph companies by that statute, which, as the report of the case shows, authorized the formation of corporations for the purpose of building and operating telegraph lines or conducting the business of telegraphing in any way, 'or for any lawful business or purpose whatever.' The New Jersey case involved the question whether a company organized under the act of that State to incorporate and regulate telegraph companies was entitled to operate and condemn a route for a telephone line. The last case involved the rights of a telephone company under the statutes of Tennessee, one of which related in terms to telegraph companies, and the other authorized foreign and domestic corporations to construct, operate and maintain such telegraph, telephone and other lines necessary for the speedy transmission of intelligence along and over the public ways and streets of the cities and towns of that State. It was held in that case that a telephone company under its right to construct and operate a telegraph was empowered by statute to establish a telephone service. None of those cases involved a construction of the act of Congress; and the general language employed in some of them cannot be regarded as decisive in respect of the scope and effect of that act, however pertinent it may have been as to the meaning of the particular statutes under examination.

"It may be that the public policy intended to be promoted by the act of Congress of 1866 would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what Congress might have done in 1866, nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, Congress in 1866 knew only of the invention then and now popularly called the telegraph. When therefore the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings."

"In 1887 the Postmaster-General submitted to the Attorney-General the question whether a telephone company or line, offering to accept the conditions prescribed in Title LXV of the Revised Statutes (being the act of 1866), could obtain the privileges therein specified. Attorney-General Garland replied: 'The subject of Title LXV of Revised Statutes is telegraphs. In all its sections the

words "telegraph," "telegraph company," and "telegram" define and limit the subject of the legislation. When the law was made, the electric telegraph, as distinguished from the older forms, was what the lawmakers had in view. The electric telegraph, when the law was made, as to the general public, transmitted only written communications. Its mode of conduct is yet substantially the same. This transmission of written messages is closely analogous to the United States mail service. Hence the acceptance of the provisions of the law by the telegraph company was required to be filed with the Postmaster-General, who has charge of the mail service. Under the several sections embraced in the Title, in consideration of the right of way and the grant of the right to pre-empt forty acres of land for stations at intervals of not less than fifteen miles, certain privileges as to priority of right over the line, also the right to purchase, with power to annually fix the rate of compensation, were secured to the Government. Governmental communications to all distant points are almost all, if not all, in writing. The useful Government privileges which formed an important element in the legislation would be entirely inapplicable to telephone lines, by which oral communications only are transmitted. A purchase of a telephone line certainly was not in the mind of the lawmakers. In common and technical language alike, telegraphy and telephony have different significations. Neither includes all of the other. The science of telephony as now understood was little known as to practical utility in 1866, when the greater part of the law contained in the Title was passed. Telephone companies therefore are not within the "category of the grantees of the privileges conferred by the statute." If similar privileges ought to be granted to telephone companies, such a grant would come within the scope of legislative rather than administrative power." 19 *Opin.* 37.

"It is not the function of the judiciary, because of discoveries after the act of 1866, to broaden the provisions of that act so that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of Congress. If the act be construed as embracing telephone companies, numerous questions are readily suggested. May a telephone company, of right, and without reference to the will of the States, construct and maintain its wires in every city in the territory in which it does business? May the constituted authorities of a city permit the occupancy only of certain streets for the business of the company? May the company, of right, fill every street and alley in every city or town in the country with poles on which its wires are strung, or may the local authorities forbid the erection of any poles at all? May a company run wires into every house in a city, as the owner or occupant may desire, or may the local authorities limit the number of wires that may be constructed and used within its limits? These and other questions that will occur to every one indicate the confusion that may arise if the act of Congress, relating only to telegraph companies, be so construed as to subject to national control the use and occupancy of the streets of cities and towns by telephone companies, subject only to the reasonable exercise of the police powers of the State. But even if it were conceded that no such confusion would probably arise, it is clear that the courts should not construe an act of Congress relating in terms only to 'telegraph' companies as intended to confer upon companies engaged in telephone business any special rights in the streets of cities and towns of the country, unless such intention has been clearly manifested. We do not think that any such intention has

been so manifested. The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by Congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of Congress upon implication merely; particularly if that construction might tend to narrow the full control always exercised by the local authorities of the States over streets and alleys within their respective jurisdictions. If Congress desires to extend the provisions of the act of 1866 to companies engaged in the business of electrically transmitting articulate speech—that is, to companies popularly known as telephone companies, and never otherwise designated in common speech—let it do so in plain words. It will be time enough when such legislation is enacted to consider any questions of constitutional law that may be suggested by it.

"Something was said in argument as to the power of Congress to control the use of streets in the towns and cities of the country. Upon that question it is not necessary to express any opinion. We now adjudge only that the act of 1866, and the sections of the Revised Statutes in which the provisions of that act have been preserved, have no application to telephone companies whose business is that of electrically transmitting articulate speech between different points.

"What rights the appellee had or has under the laws of Virginia and the ordinances of the city of Richmond is a question which the Circuit Court did not decide, but expressly waived. It is appropriate that that question should first be considered and determined by the court of original jurisdiction."